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# In the Supreme Court

OF THE  
**United States**

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OCTOBER TERM, 1944

**Nos. 510 and 511**

MARKET STREET RAILWAY COMPANY,

*Appellant,*

VS.

RAILROAD COMMISSION OF THE STATE OF CALI-  
FORNIA and FRANCK R. HAVENNER, C. C.  
BAKER, JUSTUS F. CRAEMER, RICHARD  
SACHSE and FRANK W. CLARK, the Mem-  
bers of and Constituting the Railroad  
Commission of the State of California,

*Appellees.*

## BRIEF FOR APPELLEES.

✓ EVERETT C. McKEAGE,

RODERICK B. CASSIDY,

✓ WYMAN C. KNAPP,

FRANK B. AUSTIN,

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*Appellees.*

## BRIEF FOR APPELLEES.

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### JURISDICTION.

Appellees here reiterate their position taken in their statement opposing jurisdiction and their motion to dismiss or affirm and by reference incorporate herein the argument and authorities cited in said statement and motion, and hereby move this Court to dismiss this case or affirm the judgment of the lower court.

**EVENTS OCCURRING SINCE THE RENDITION OF THE  
ORDER OF THE RAILROAD COMMISSION AND OF  
THE DECISION OF THE SUPREME COURT OF CALI-  
FORNIA.**

While the matters adverted to by the appellant under this heading are outside the record, nevertheless, appellees take the position that these facts should be taken into consideration by this Court in disposing of this case. Appellees do not want it understood that they subscribe to the propositions advanced and the argument made under this heading by appellant at pages 3 to 10 of its brief. Appellees point out that the appellant caused the sale of its properties to be made to the City and County of San Francisco and that it cannot complain of any alleged prejudice which that act on its part may have caused it. It would be indeed a novel principle of law that would permit a party to commit an act and then to claim that such act prejudiced such party and, therefore, someone else should suffer the prejudice thereby caused rather than the party committing such act. Appellees assert that the authorities cited by appellant under this heading have no application to the situation presented in the instant case and that this Court, in disposing of this case, would be free to make whatever decision that justice and equity might require. The fact that the City and County of San Francisco has established a 7-cent fare for the purpose of enabling it to purchase the properties of the appellant could have no possible bearing upon the order made by the Railroad Commission or the affirmance of such order by the Supreme Court of California. The documents attached to appellant's brief conclusively show that the reason for the establishment of the 7-cent fare was for the

purpose of enabling the City and County of San Francisco to purchase the properties of the appellant and the implication is clear that the intent is that, after sufficient revenue has been earned under a 7-cent fare to pay the purchase price of these properties, the 7-cent fare will be reduced. (pp. 8-33, particularly pp. 13 and 26 of Appendix of Appellant's Brief.)

With regard to the action that this Court might take in connection with the circumstances and events occurring since the rendition of the order of the Railroad Commission and the decision by the Supreme Court of California, it is well to keep in mind the decision of this Court in the case of *Interstate Commerce Commission v. City of Jersey City* (decided May 29, 1944), 88 L. ed. (Adv. Ops.) 1064 at p. 1070, where this Court made the following pertinent observation:

“\* \* \* If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that *the discretion to be invoked was that of the body making the order, and not that of a reviewing body.*” (Emphasis supplied.)

**STATEMENT OF THE CASE.**

Appellant's statement of the case when considered in the light of the actual facts is, to say the least, extraordinary. Appellant contends that the Railroad Commission denied to appellant the most elementary rudiments of procedural due process; that it proceeded in the total absence of evidence and that the Supreme Court of California, consisting of seven justices, unanimously approved of such unlawful conduct by affirming the rate reduction order issued by said Railroad Commission. Surely, such an extravagant position as appellant takes could hardly recommend itself to this Court in light of the obvious infirmities of appellant's position when considered upon the facts of record.

After hearings occurring on May 10, July 15 and September 15, 1943, said Railroad Commission on November 30, 1943, issued the rate reduction order involved in this proceeding (R. 59) whereby it reduced appellant's rates from 7 cents to 6 cents. Appellant duly filed a petition for rehearing and two days of argument (December 21 and 23, 1943) were had on said petition, which was denied January 12, 1944. In denying said petition for a rehearing, said Commission filed a comprehensive decision setting out fully its reasons for such denial. (R. 114.) By successive orders, the effective date of said rate reduction order was extended to February 29, 1944, without requiring appellant to account for the excess rate charge collected, which amounted to approximately \$144,000.

Appellant, in its statement of the case, asserts that said Railroad Commission based its decision upon evidence wholly outside the record. Such a charge seems to come

with poor grace from the appellant, who has indulged very generously in the practice of going outside the record in its brief filed with this Court. As an example, we cite the assertions appearing in the first paragraph of page 31 and the contents of footnote 53 at page 51 of appellant's brief setting out alleged labor statistics. Also, appellant seeks to have reviewed by this Court the entire proceeding involving the sale of appellant's properties to the City and County of San Francisco, all of which are matters completely outside the record in this case. While appellees have no objection to the consideration of the matters concerning the sale of appellant's properties to said City and County, nevertheless, they are matters outside the record and matters which appellant seeks to have considered for the specific purpose of enhancing appellant's position before this Court.

At page 16 of appellant's brief, it is claimed that the operating results figures used by the Commission in arriving at a fair rate of return appear nowhere in the record and can be derived from no figures in the record. This assertion is simply not true. These figures, as will hereafter be shown, *were legitimate computations permissibly deduced from the facts and figures contained in the record.* Rate-making is, of necessity, *prospective* in its nature and *future rates must be based upon anticipated future operating results*, which, in turn, must be based upon past experience and performance. How could it possibly be otherwise?

On page 12 of appellant's brief, the two proposed sales of appellant's properties to the City and County of San Francisco for a price of \$7,950,000, one in September 1942



and the other in March 1943, are adverted to. The two resolutions of the Board of Directors of appellant authorizing these proposed sales appear in the record at pages 163 to 165. It will there be noted that the Board of Directors definitely authorized the sale of appellant's properties for the sum of \$7,950,000 and in the resolution of September 24, 1942, stated:

"\* \* \* The President" (of appellant) "stated further that the price mentioned had been agreed upon after lengthy negotiations extending over a period of about two years and is the best price obtainable from the City and County of San Francisco for the operative properties of the Company."

In the resolution of March 25, 1943, the following statement appears:

"\* \* \* The President" (of appellant) "also stated that the price mentioned is the amount that had been agreed upon for the purchase by the City and County of San Francisco of the operative properties of the Company after negotiations in respect thereto which covered a considerable period of time and, as previously mentioned, is the best price obtainable therefor."

In each resolution, the officers of appellant were unqualifiedly authorized and directed to perform all necessary and proper acts in order to carry out and complete the sale of the operative properties of appellant to the City and County of San Francisco for the said sum of \$7,950,000. It is true that the voters of the City and County of San Francisco twice refused to purchase the properties of appellant, and it is also true that at a third election the voters did agree to purchase appellant's properties for the sum of

\$7,500,000. The fact that the stockholders of appellant had not been consulted concerning the first two offers of sale is *wholly immaterial* so far as the fair value of appellant's properties is concerned. The important point to be kept in mind is that the Board of Directors of appellant did set \$7,950,000 as the price for the properties of appellant, so far as a sale was concerned. This act on the part of said Board was very important evidence as to value, notwithstanding the fact that the voters of the City and County of San Francisco rejected both of these offers of sale and notwithstanding ~~the fact~~, if it be a fact, that the stockholders of appellant were not formally consulted. The fact remains that these properties were later sold for a less sum of money with the concurrence of the voters of the City and County of San Francisco and the stockholders of appellant.

At page 18 of its brief, appellant asserts that the use by the Railroad Commission of the figure of \$7,950,000 as a rate base is of subordinate importance and that it emphasized that fact in the court below. This assertion on appellant's part is rather amusing in light of its strenuous argument to the exact contrary in its petition for a rehearing before said Railroad Commission and in its briefs and oral argument before the court below. *Obviously, appellant must now take its present position in face of the bald fact that it has sold its properties to the City and County of San Francisco for \$7,500,000, which is \$450,000 less than was allowed to it as a rate base by the Railroad Commission.* It is significant that appellant, at no time, ever suggested a rate base figure or fair value that should be allowed for its properties for rate-making purposes. It

contented itself with criticising the rate base set by the Commission.

The figure of \$7,950,000 used as a rate base was accepted as a figure representing market value and was more reliable than any figure that might be arrived at by the employment of the conventional formulae for ascertaining fair value.

In rate proceedings regulatory agencies are generally faced with the problem of the methods or means by which to arrive at a judgment of the fair value of utility properties. In such cases it is necessary for the agency to adopt some rate base figure in order to test the reasonableness of rates. The difficulty lies in the ascertainment of the proper rate based under the circumstances present in particular cases. But neither the Legislature nor the courts have restricted the Commission to the use of any particular formula. In performing the legislative function of rate-making, the utility commissions have been left free, "within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." (*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586. See also *Knoxville v. Knoxville Water Company*, 212 U.S. 1; *San Joaquin L. & P. Corp. v. Railroad Commission*, 175 Cal. 74, 76.)

In so far as utility properties are concerned, "the criteria at hand for ascertaining market value, or what is called exchange value, are not commonly available." (*L. A. Gas & E. Corp. v. Railroad Commission*, 289 U.S. 287, 305.) Utility property is not ordinarily the subject of barter and

sale. But in this proceeding the Commission had before it appellant's twice-repeated offer to dispose of its properties for \$7,950,000, and used that amount as an appropriate rate base in light of the record before it. The Commission considered that these offers to sell, made by appellant in good faith, represented appellant's own judgment of the market or exchange value of appellant's properties.

The formulae used in arriving at a "fair value" of the operative properties of a utility are *but a substitute used in default of the existence of market value*. As pointed out by Oscar L. Pond in his exhaustive work, *Public Utilities*, Volume 2, present value is the true test. Mr. Pond states (p. 1120):

"While all accurate available evidence of the original cost, as well as the cost of reproduction is desirable and helpful in determining the extent of the actual investment necessary to render the service in any particular case, neither these nor the amount of capitalization are conclusive. *The actual present market value of the plant or its worth as a going concern is the ultimate practical basis for determining the value of the investment upon which to fix a rate which will produce a fair return.*" (Emphasis supplied.)

Thus, if market value were ascertainable, no need would exist for the judicial formulae for ascertaining fair value. "Market value" would be "fair value" and the application of the several judicially defined standards would become unnecessary. When the reason for the rule ceases, so does the rule. That is the exact situation in the instant case. The owner of these properties twice stated publicly that it would sell the same for \$7,950,000 and twice offered to sell

such properties to the people of San Francisco for that price. In the circumstances, that price represented the market value of these properties.

At pages 13 to 17 of appellant's brief, the claim is made that appellant had no notice that *reasonableness of rates* would be an issue involved in the proceeding before said Railroad Commission out of which the rate reduction order issued. This statement is unqualifiedly erroneous. The order instituting the investigation both in its caption and also in its body (R. 56) stated that the Commission's investigation would involve "*the reasonableness of rates, charges, classifications, rules and regulations of the Market Street Railway Company.*" (Emphasis supplied.) Each and every caption of the formal papers filed in this proceeding embodied therein the expression "reasonableness of rates" and the presiding Commissioner at the opening of the hearing of this proceeding on May 10, 1943 (R. 366) stated, among other things, that the hearing would involve "the reasonableness of the rates" of appellant. At the hearing on May 10, 1943, Mr. Hunter, Assistant Director of Transportation of the Railroad Commission, testified in part as follows (R. 368 to 370):

"\* \* \* The information that the Commission had before it when it instituted this investigation may be briefly summarized as follows—I will first refer to annual reports that are filed with the Commission.

"First we have the regular annual report, forms of which are furnished all privately owned public utilities and these public utilities are required to supply the desired information. That, of course, is a continuing record over a long period of time. In addition to that

the Commission receives annual reports from this carrier, which is the copies of annual reports to its stockholders. This annual report is required to be filed pursuant to the terms of General Order 65.

"In addition to the annual reports the Market Street Railway files monthly reports with the Commission. These monthly reports show considerable detail with respect to the operating results of that carrier. Under one heading 'Income Accounts' it shows the situation for the current month, the calendar year, the year ending the current month and the same information is shown for the preceding year.

Another section of this monthly report is given to the balance sheet or financial statement; that is based upon the results of the current month, preceding month and the same information for the last year.

"The next section is an analysis of bond and note indebtedness. First it takes up the matter of the situation as at the end of the current month. Another chapter is devoted to preferred and common stock issues.

*"The last portion of this monthly report is given to a construction statement showing original cost of physical properties based upon the valuation as of April 1st, 1921. This valuation is brought up to date by adding additions and betterments and eliminating retirements.*

"I will now refer to reports that were before the Commission and prepared by the Commission's staff. First, was a report—and I might say I will only include those that are of recent date—a report dated August 31, 1942, which is entitled, 'Report on present market value of the Market Street Railway Company, San Francisco.' This report was prepared pursuant to a representation to the Commission by a number of



the members of the Board of Supervisors of San Francisco to the effect that the Board desired the assistance of the Commission in attempting to arrive at a fair market price for the properties, as the City was then considering the purchase of the Market Street system.

"Another report—and this is the last report prepared by the Engineering Department—dated November 16, 1942, and that report is entitled, 'Study to determine the operating results with the same fare on the line of the Market Street Railway and the Municipal Railway system of San Francisco.' *The primary purpose of this report was to give the Commission the benefit of certain studies dealing with the estimated operating results that would obtain in employing a uniform fare structure; each of them provided for a universal transfer. The estimates were based upon a 6-cent fare for both properties; this study followed immediately after the election on November 3rd, wherein the voters refused to purchase the property for \$7,950,000.*

"In addition to these reports to which I have just referred the Engineering Department carries a continuing running chart—continuing running charts on the operating results of all street car companies in this State. These running charts show operating revenues, operating income, taxes, depreciation, operating expenses, revenue passengers. Also shows the fare changes, if any, during the period. Now, those charts have been carried forward since 1920 to date. In addition to the carriers operating under the Commission's jurisdiction we have the same information for the municipal lines.

"In addition to the reports furnished the Commission by the Transportation Department the Depart-



ment of Finance and Accounts keeps the Commission advised by periodic reports showing the results of certain operations from information in their possession.

*"I have tried to briefly touch on the high lights or cross-section of this information that the Commission had before it before the investigation was instituted, April 22nd."*

*"At this time the Engineering Department of the Commission's Transportation Department is prepared to present certain information now available with the understanding that further studies and reports will be prepared and presented later dealing in more detail with the elements that should be considered in connection with the investigation now before the Commission. These further studies will include operating revenues, and might I state here the information to which I have referred with respect to the operating results have, to a considerable extent, been taken from the Company's records; it is our plan in future studies to perhaps go into those accounts pretty much on our own basis and determine whether or not, in our opinion, there should be any changes in those items. Continuing now, we will investigate operating expenses, taxes, depreciation, studies on rate base figures, the estimated operating results that would obtain under different fare structures. In addition to the information that the Transportation Department is ready to present the Department of Finance and Accounts is now prepared to present a report showing the Company's assets, liabilities, profit and loss and income accounts for the past five years."* (Emphasis supplied.)

Pursuant to the statement made by the witness Hunter at the May 10, 1943 hearing before said Railroad Commis-

sion, this proposed material was received in evidence at the July 15, 1943 hearing, particularly Exhibit 10, which is a comprehensive study of the history of appellant as to all phases of its operations. (R. 165 to 261.) Space would not permit the analyzation of all of the elements of Exhibit 10 but it does cover, together with the other exhibits introduced in evidence, the entire range of subjects that are conventionally and usually covered in rate proceedings. At the hearing of July 15, 1943, before the Railroad Commission, contemporaneously with the introduction into evidence of Exhibit 10, Mr. Mors, the Transportation Research Engineer of the Railroad Commission, testified in part as follows: (R. 408)

*"The purpose of the report" (referring to Exhibit 10) "is to present a brief historical summary of the financial results of operation of Market Street Railway Company over the 21 years ending December 31, 1942, with particular reference to the last few years and with some consideration of results for the first few months of 1943.*

*"The report consists, primarily, of an analysis of the Company's operating expenses, depreciation practices, including a comparison of operating expense trends with trends of the corresponding expenses in the San Francisco Municipal Railway and in the Los Angeles Railway Corporation. Revenues are analyzed to determine the effect of recent fare increases and other factors upon the revenue and traffic of Market Street Railway and upon the distribution of revenue and traffic between Market Street Railway and the Municipal Railway.*

*"A section is devoted to discussion of the road and equipment account and another section to a brief analysis of taxes.*

*"Pertinent information regarding the Company's historical background, organization and financial control and present operations are also included."* (Emphasis supplied.)

Appellees assert that the foregoing indicated elements contained in Exhibit 10 are the basic elements involved in any rate proceeding. If appellant did not understand that such evidence is of the very essence of a rate proceeding, then, it must be admitted that appellant has only its ignorance to blame for misunderstanding the aim and the purport of the proceeding in question.

Appellees might point out at great length the many and voluminous exhibits received in evidence in the proceeding before said Railroad Commission but the immediately foregoing evidence adverted to conclusively demonstrates that each and every element involved in a rate proceeding was present in the proceeding in question and that appellant had ample and notorious notice that such issues were involved.

On page 33 of appellant's brief certain testimony of the witness Hunter is quoted (R. 467) to the effect that the investigation *did not analyze the rate situation*. The witness Hunter's testimony so referred to was directed to Exhibit 17 which dealt exclusively with service and bore the following caption: "Report Dealing With Service on Market Street Railway." (R. 279.) *The witness Hunter was not referring to the entire proceeding and was addressing himself to the contents of Exhibit 17, which he had before him at the time he was testifying.*

This is a fair sample of the manner in which appellant has treated this record by stating disconnected bits thereof

wrenched out of the context without stating the entire record on the particular point in question.

Also, at pages 23 to 26 of its brief, appellant refers to certain statements made by certain of the members of said Railroad Commission during the progress of the proceeding in question, alleging that these statements indicated that the issue of the reasonableness of rates was not involved therein. These statements do not support the position taken by the appellant and so show on their face. In any event, the reasoning of some witness or some Commissioner as to what is or is not an issue in a proceeding would be immaterial if, in fact, the evidence received in such proceeding is sufficient upon which to base the particular issue in question. It is judicial or administrative action that this Court reviews, not reasoning or mental processes employed in arriving at such action. (*Morgan v. U. S.*, 304 U.S. 1, 18; 82 L. ed. 1129, 1132.) However, appellees do not concede that any statement made by any Commissioner or any witness during the proceeding in question excluded the issue of the reasonableness of rates or even had a tendency to mislead the appellant as to the existence of that particular issue.

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**PRESUMPTION OF LEGAL CORRECTNESS AND VALIDITY  
ATTACHES TO DECISIONS AND ORDERS OF THE  
RAILROAD COMMISSION.**

It is elementary that the decisions of a public service commission are presumptively correct and valid when attacked in a court. In the case of *Federal Power Commission v. Hope Natural Gas Company*, 88 L. ed. (Adv.

Ops.) 276 at p. 283, this Court pointed out that orders of a public regulatory commission are presumptively correct. Said this Court:

“ \* \* \* Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a *presumption of validity*. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission v. Cumberland Teleph. & Teleg. Co.*, 212 US 414, 53 L ed 577, 29 S Ct 357; *Lindheimer v. Illinois Tel Co.*, supra 292 US pp 164, 169, 78 L ed 1191, 1193, 54 S Ct 658; *Railroad Commission v. Pacific Gas & E. Co.*, 302 US 388, 401, 82 L ed 319, 326, 58 S Ct 334.” (Emphasis supplied.)

Appellees contend that there is no burden cast upon them to produce one figure or one fact in defense of the rate reduction order involved in this proceeding until such time as appellant has made a *prima facie* showing to this Court that said rate order is invalid. Then, and only then, are appellees called upon to defend the order issued against appellant. As was said in the *Hope Natural Gas* case, supra:

“ \* \* \* the Commission's order does not become suspect by reason of the fact that it is challenged.” (Emphasis supplied.)

The rule announced in the *Hope Natural Gas* case, supra, is no new rule of law. It has always been the law in regard to decisions and orders of public regulatory bodies.

In the case of *San Diego L. & T. Co. v. Jasper*, 189 U.S. 439, 441, Mr. Justice Holmes, speaking for this Court, stated:

“••• In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.” (Emphasis supplied.)

Quoting with approval the decision in the case of *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63, 70, Mr. Chief Justice Hughes, speaking for this Court, had this to say in the *Pacific Gas and Electric Company* case (302 U.S. 388, at pages 394, 395):

“Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern R. Co. v. Virginia*, 290 U.S. 190, 78 L. ed. 260, 54 S. Ct. 148) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error.” (Emphasis supplied.)

Again, in the case of *Lindheimer v. Ill. Bell Tel. Co.*, 292 U.S. 151, 175, Mr. Chief Justice Hughes, speaking for this Court, observed as follows:

“••• It is not the function of the court to attempt to construct out of this voluminous record independent calculations to invalidate the challenged rates. It is



enough that the rates have been established by competent authority and that their invalidity has not been satisfactorily proved." (Emphasis supplied.)

Quoting again from the *Hope Natural Gas* case, supra, at page 283:

"It is not theory but the impact of the rate order which counts."

It is elementary, and this Court has held it to be the law, that in a proceeding of this nature the only question for determination by the Court is one of confiscation.

*Railroad Commission v. Pacific Gas and Electric Co.*,  
302 U.S. 388, 394;

*Los Angeles Gas and Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304, 305;

*West Ohio Gas Co. v. Public Utilities Commission*,  
294 U.S. 63, 70.

Appellees submit that unless the appellant has established by substantial and convincing showing the invalidity of the rate order involved in this proceeding, judicial inquiry by this Court is at an end and, further, that the burden of overthrowing the legal presumption of the validity of said rate order rests heavily upon appellant.



## ARGUMENT.

### I.

#### APPELLANT WAS ACCORDED PROCEDURAL DUE PROCESS AT EVERY STAGE OF THE RATE PROCEEDING IN QUESTION.

Appellees assert that the evidence set out in the immediately foregoing statement of the case conclusively shows that appellant was accorded, to the fullest extent, procedural due process of law in the rate proceeding here under attack, and that it was accorded the fullest and most complete notice that the reasonableness of its rates was an issue involved in the proceeding. Furthermore, this Court has held in a similar situation that the type of order instituting an investigation as was employed in the instant proceeding gives to a party ample notice that the reasonableness of rates will be an issue in the proceeding.

This Court held in the case of *American Toll Bridge Company v. Railroad Commission of California*, 307 U.S. 486, at page 492, as follows:

"The Commission initiated the proceeding, entitled 'In the matter of the investigation upon the commission's own motion, into the rates, charges, contracts, classification, rules and regulations of American Toll Bridge Company covering its operation of the toll bridge over the Carquinez Straits between the counties of Contra Costa and Solano;' gave appellant notice that the investigation would extend to tolls for use of that bridge; \* \* \*."

The order instituting the investigation in the instant case referred not only to rates but to *reasonableness of rates* which is a much stronger and much more informative term than the term "rates."

In support of this proposition, we also refer to the following authorities:

*National Labor R. Board v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349;

*Railroad Commission of California v. P. G. & E. Co.*, 302 U.S. 388, 392, 393;

*Northwestern Bell Tel. Co. v. Nebraska State Ry. Commission*, 297 U.S. 471, 476, 477;

*People ex rel. N. Y. & Queens Gas. Co. v. McCall*, 245 U.S. 345, 348, 349;

*Asbury Truck Co. v. Railroad Commission of California*, 52 F. (2d) 263; (Affirmed per curiam, 287 U.S. 570.)

In the latter case, the Court said, at page 268:

"To meet the requirements of due process of law, an administrative body, such as the defendant commission, need not follow any particular form of procedure. While it is essential that before one's rights are determined, a hearing of some kind must have been accorded, it is sufficient if the party affected is apprised of the nature of the hearing and is afforded the opportunity to offer evidence and to examine that of the opposition."

In light of the evidence heretofore pointed out and the authorities hereinabove cited, appellees submit that each and every element of procedural due process was accorded to appellant.

While appellant apparently strongly relies upon the two *Morgan* cases (*Morgan v. United States*, 298 U.S. 468; *Morgan v. United States*, 304 U.S. 1), appellees assert that the rule announced in those two cases is in complete har-

mony with the conduct of said Railroad Commission in the instant proceeding. In those cases this Court was concerned primarily with the method by which the officer charged with the responsibility of determining the issues (the Secretary of Agriculture) had arrived at his decision. The procedure therein condemned by this Court is not present in this case. The Commission, in the instant case, heard all the evidence and therefore did not violate the rule that "He who decides must also hear."

## II.

### **RATE REDUCTION ORDER IS FULLY SUPPORTED BY THE EVIDENCE.**

In Part II of its brief, appellant charges that the Commission's order is invalid under the due process clause "because it is unsupported by evidence and is based upon the Commission's speculation and conjecture." The assertions in support of this unequivocal charge, made in the face of the Commission's decision and the unanimous opinion of the Supreme Court of the State of California, in the main are (a) that the Commission found the 7-cent fare unreasonable without having in the record revenue or expense figures upon which it relied (Appellant's Brief, p. 39); (b) that revenue and expense estimates under the ordered 6-cent fare were not of record and could not be derived from evidence of record (Appellant's Brief, p. 40); (c) that no consideration was given by the Commission to allocating traffic, revenues, and expenses as between San Francisco operation and appellant's suburban lines, and that, therefore, there is no basis in the record for any

test of the reasonableness of the ordered rate (Appellant's Brief, p. 45); (d) that the Commission's expectations of future revenue, future expense, and future traffic, made without evidence, form the foundation of the Commission's order (Appellant's Brief, p. 45); and (e) that the Commission asserted the right to use its expert knowledge in supplying missing facts (Appellant's Brief, p. 46).

The record is not deficient, as alleged, in that there is evidence of record (a) to support a finding that the 7-cent fare is unreasonable, and (b) to support findings and a conclusion that for the future a 6-cent fare would be just and reasonable.

In the face of the evidence of record we can but assume that appellant's underlying complaint against the approach taken by the Commission is that time-worn valuation formulae were not spread on the record as a background for the Commission's deliberations. Hence, it is said that the Commission's order is based upon speculation and conjecture; due process of law has not been accorded.

The ordered reduction speaks *in futuro*. And future estimates of revenue, expenses, and earnings must be adjudged in light of projections made by experts and based upon the utility's experience of the present and the past. As stated by the California Supreme Court:

"The commission has the experience and the data at hand from which to cull the estimates of probable increase in traffic under a reduced fare and improved service, and of the probable operating revenues, expenses, and other costs." (R. 620.)

In fairness to the Court, we desire squarely to meet the charge of appellant. Accordingly, the record before the Commission has been summarized in topical form and

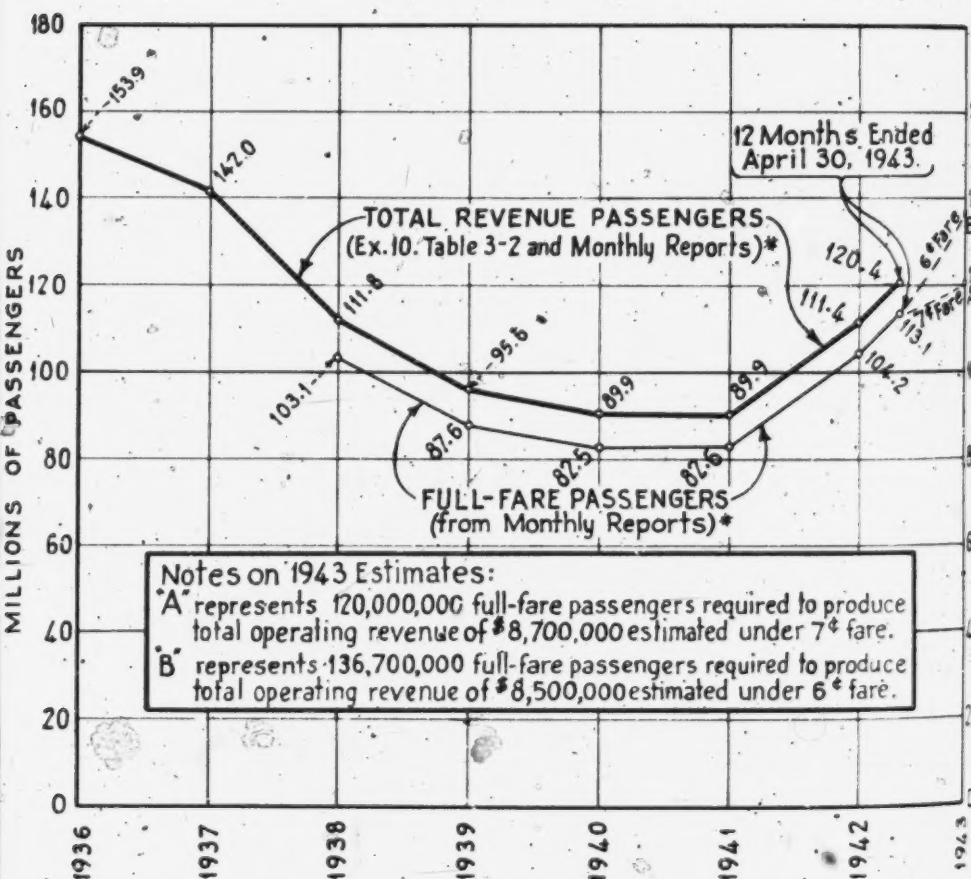
appended to this brief? It illustrates the completeness of the record. It reveals the background for the Commission's opinion and order. And it brings into bold relief the basis for condemning the 7-cent fare and, in lieu thereof, ordering a 6-cent fare established. Of particular importance in the latter respect is the material included in the appendix under the headings, Trend of Revenue, Effect of Fare Increases, Universal Transfer, Trends of Operating Expenses, Wages, Depreciation Expenses, Depreciation Reserve, Disposition of Depreciation Accruals, Trends of Earnings, Effect of Fare Changes, Earnings, Future Outlook, Relation of Fare to Service, Comparison with Other Localities, Fare Changes, One-Man Car Operation, Wages and Working Conditions, Traffic and Loading, Performance of Schedules, Quality of Service, Relation Between Service and Fares, Design of Schedules, and on details of operating expenses under various headings.

Appellant, as a matter of tactics, has quoted certain passages from appellees' brief in the court below and has high-lighted disconnected statements in an effort to persuade this Court that no regard has been had for substantive due process. Its challenge, we submit, is adequately and conclusively met if this Court is presented with the full statement of our discussion before the State court respecting the 7- and 6-cent fares. In order that this Court may not be misguided in the processes by which the Commission utilized and applied facts of record, we quote from appellees' brief in the lower court: (pp. 16-20, inclusive.)

"With respect to the basis of the Commission's revenue estimates, the Court is respectfully referred



# MARKET STREET RAILWAY COMPANY TREND OF REVENUE PASSENGERS 1936 TO 1942 AND 1943. ESTIMATED AT 7-CENT FARE AND 6-CENT FARE



\* The company's monthly reports from 1938 to April 1943 are a part of the record by stipulation (Transcript, page 19)

## HISTORY OF FARES

1936 5¢ fare, free transfer

1937 { January 1 to July 5: 5¢ fare, free transfer.  
 { July 6 to December 31: 5¢ fare, 2¢ transfer.

1938 { January 1 to May 28: 5¢ fare, 2¢ transfer.  
 { May 29 to December 31: 7¢ or 4 tokens for 25¢, free transfer.



to the diagram opposite this page, on which the total revenue passengers of petitioner are plotted from 1936 to 1942, inclusive, showing both the trend of traffic and the actual figures for each of those years. The actual figure for the 12-month period ending April 30, 1943, is also shown. In the lower curve on the diagram the full-fare passengers are shown for the period 1938 to April 30, 1943. All figures are taken from the record, Exhibit 10 Chart 3-2 (following page 17)" [R. 194-A] "and Table 3-2 (following page 15) [R. 190] "and from monthly reports of petitioner which are in the record by stipulation. The diagram also shows in dotted lines the estimated full-fare passengers for the entire year 1943 with, respectively, the 7-cent fare and the 6-cent fare in effect. These dotted lines represent the estimates made by the Commission.

"The Commission concluded that with the 7-cent fare in effect for the full year 1943 approximately 120,000,000 full-fare passengers would make use of petitioner's lines. This number of passengers would produce  $(120,000,000 \times 7 \text{ cents})$  \$8,400,000 gross revenue. The Commission concluded that the total gross revenues in 1943, with the 7-cent fare, would be \$8,700,000. The additional \$300,000 would be contributed, in the same proportions as in the past, by revenues other than from the 7-cent fare. Such other fares were not changed by the Commission. *Full-fare passengers have consistently produced more than 95 per cent of the total operating revenue in recent years.*

"In reaching this conclusion the Commission obviously made a conservative and reasonable estimate. The upward trend of full-fare passengers is clearly shown when the years 1941 and 1942 are compared and that upward trend is even sharper for the 12-

month period ended April 30, 1943. Based on this evidence in the record, the Commission could properly and reasonably assume that this trend would hold throughout the year 1943 and for a reasonable period in the immediate future. The Commission, however, took a more conservative attitude and concluded that the number of full-fare passengers for the year 1943 would amount to only 120,000,000. This estimate of full-fare passengers is the Commission's own estimate and cannot therefore appear in the record, and neither is reference made to that particular figure in the decision. The Commission's decision made reference to dollar revenue, expense and profit. The number of passengers was converted into gross revenue. The foregoing shows the evidence on which the Commission based its estimate of \$8,700,000 operating revenue under the existing 7-cent fare.

"Petitioner next alleges that 'evidence is entirely absent concerning the expense of handling that traffic.' Petitioner's operating expense is a matter of the most detailed record in this proceeding by separate years (and for a portion of that period by separate months) and by individual operating accounts for the period 1922 to 1942, inclusive, (Exhibit 10, pp. 20 to 37;" [R. 197 to 240] "also Exhibits 1 and 2" [R. 142, 151]. "For the last full year (1942) in the record, petitioner's *actual* operating expenses, including depreciation and taxes, were \$6,504,627. The Commission's allowance of \$7,940,000 for operating expenses in 1943 was estimated in a manner similar to its estimate of traffic and of revenue as above referred to.

"The Commission's conclusion as to the number of full-fare passengers that would make use of petitioner's service under a 6-cent fare is shown at point

B of the preceding diagram and represents 136,700,000 passengers. This number, at a 6-cent fare, will produce an operating revenue of approximately \$8,200,000. The Commission's conclusion was that with a 6-cent fare the total annual operating revenue of petitioner would amount to \$8,500,000, a difference of \$300,000, which is again accounted for by revenues from other than 6-cent fares. The difference between the estimated number of passengers under the 6-cent fare and the number estimated under the 7-cent fare, it will be noted, is due to the stimulation of traffic resulting from the decrease in fare and is comparable to the loss of passengers in 1937, 1938 and 1939 when the fares were progressively increased from 5 cents to 7 cents.

"The Commission in its decision (Appx. to Petition, p. 44)" [R. 91] "sets forth the estimated operating results on which the 6-cent fare is based, as follows:

"We expect the company to make every reasonable effort to improve the present unsatisfactory and inadequate service and to put all available equipment into operation. With a six-cent fare it is our expectation, based on the evidence available from the record and from the company's past and present experience, that an annual revenue of approximately \$8,500,000 will be produced. Operating expenses, including taxes and \$750,000 for depreciation, we estimate, will amount to about \$8,000,000, leaving a net operating income of about \$500,000, corresponding to an approximate rate of return of 6% on the base figure of \$7,950,000. Such a return would be more than adequate under existing conditions."

"With reference to petitioner's allegation that 'evidence is entirely absent' concerning an estimate of

expense of handling the traffic under a 6-cent fare, the record contains the exact expense figures for all the years 1922 to 1942, inclusive, and also for the 12-month period ended April 30, 1943. (Exhibit 10, Table 8-1, following page 43.)" [R. 255] "Actual total operating expenses, including taxes and depreciation for 1942, were \$6,504,627. For the full year 1943 the Commission, on the basis of the record, concluded that, under the existing 7-cent fare with approximately the same amount of service rendered, an allowance of \$7,940,000 for operating expenses would be sufficient. The provision for increased expenses over and above the actual expenses for 1942 amounts approximately to \$1,440,000. The Commission made an allowance for operating expenses of \$8,000,000 for handling the traffic that might be expected under the 6-cent fare, an increase in operating expenses of \$1,500,000, in round numbers, over and above the actual figure for 1942.

"The Commission made no finespun estimates. They were not necessary. It concerned itself solely with two questions: first, how much traffic (how many car riders and bus riders) would there be; second, what would it cost to haul such traffic? If the number of riders is known or estimated, the record provides an almost exact basis for determining the revenue that will be produced by such riders (more than 95 per cent of petitioner's revenue has been produced by full-fare passengers). The number of riders in all of the years of the recent past is definitely known and shown in the record under the 5-cent fare, under the increases granted by the Commission in 1937 and 1938, and under the straight 7-cent fare since 1939. The Commission encountered no difficulty in reaching a reasonable conclusion of what might be expected in

the way of traffic and revenue, in round numbers, during an immediate future 12-month period. The cost of handling the existing traffic in the immediate and in the more distant past is fully shown in the voluminous record. The Commission made a substantial and liberal allowance for increased expenses. It did not assume that the certain increase in traffic under a lowered fare could be handled for the same expense as was incurred in the year 1942."

Having demonstrated conclusively that the record is adequate in every respect and that the Commission assiduously adhered to that record in its determinations, the charge that the ordered reduction was made upon "speculation and conjecture" is obviously erroneous. Perhaps in its earnest endeavor to have the sound decision of the lower court overturned, appellant has become overzealous in its comments. It follows that the reference to *West Ohio Gas Co. v. Commission* (No. 1), 294 U.S. 63, 68 (Appellant's Brief, p. 44) becomes meaningless and in need of no comment in that the proposition for which it is cited simply does not exist, at least on this record.

The appellant feigns surprise and alarm at the method by which the Commission measured operating expenses that would result from the handling of added traffic under the 6-cent fare. The record support for its deliberation is hereinafter discussed. Suffice it to say that the allowance made was liberal. (See page 31 of this brief.) Appellant would urge upon the Commission a theory whereby operating expense is said to vary directly with the increase in traffic. This theory is in sharp conflict with the record, with any sound theory of rate-making known to

appellees, and most certainly was not used in arriving at the ordered reduction.

It should be called to the attention of this Court that the same hue and cry here presented was raised in the court below; in fact, the matter was discussed in the course of oral argument and on brief, where we said:

"At the oral argument, counsel for petitioner requested that respondent explain how the figure of \$7,940,000, operating expenses of petitioner for the year 1943, was secured or computed. This figure appears in the Commission's first decision (Appendix to Petition, p. 39)" [R. 87] "and also in the opinion denying rehearing. (Appendix to Petition, p. 115)." [R. 137] "As has been explained above, this figure was obtained by using prior operating expense figures of the petitioner, which figures were in evidence. Such figure of \$7,940,000 is based upon a 7-cent fare (Appendix to Petition, p. 39)" [R. 87] "and represents a permissible estimate which the Commission could legally make from the facts in evidence. Obviously, the Commission could not know the operating results of the petitioner at a time when those results had not materialized. Members of a public utilities commission are permitted to use their knowledge of human experience in ordinary matters of life just as a trial court judge is permitted to do when trying a case without a jury, or as a juror is permitted to do."

"The figure of \$7,940,000 (estimated operating expenses for the year 1943) referred to above, included \$590,000 for taxes and \$750,000 for depreciation expense. By referring to the table in the Commission's decision which shows operating results commencing with the year 1922 and ending with the 12-month period ended April 30, 1943 (Appendix to Petition, p.



34),” [R. 83] “it will be noted that for the 12-month period ended April 30, 1943, the operating expenses, exclusive of taxes and depreciation, amounted to \$6,007,028. Taxes for that period amounted to \$122,500 and depreciation for the same period \$500,000, making the total operating expense for that period amount to \$6,929,528. By allowing for this particular 12-month period a figure of \$590,000 for taxes and a figure of \$750,000 for depreciation, the total operating expenses for that period would amount to \$7,347,028. It will be noted by the use of these two latter figures the tax allowance is increased approximately \$170,000 and the depreciation charge \$250,000. *Yet, with these generous allowances, still, the estimated operating expenses of petitioner for this particular 12-month period would be approximately \$650,000 less than the annual operating expenses of \$8,000,000 allowed to petitioner by the Commission under the 6-cent fare.*”

We submit that the foregoing discussion clearly disposes of any contention raised by appellant that only \$60,000 was allowed for additional expense for prospective increase in patronage. Patronage increase and, in fact, other unforeseen and fortuitous circumstances are adequately cared for in the amount represented by the difference between \$7,347,028 and \$8,000,000, or \$652,972.

We have taken the trouble to detail many of the mechanics and formulae by which the ordered reduction was arrived at, even at the expense of an exhausted patience. Appellant well knew from the trial of these matters, from the rehearing stage, and from its unsuccessful effort in the lower court the extent to which these calculations were justified by the record. And yet it has seen fit again to



raise a matter which at this stage is no more than time-consuming. In the final analysis, these calculations are but a phase of the "pragmatic adjustments" left within the province of the Commission. (*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586. See also *Knoxville v. Knoxville Water Company*, 212 U.S. 1; *San Joaquin L. & P. Corp. v. Railroad Commission*, 175 Cal. 74, 76.)

(c) Consideration was given to allocation of operations as between San Francisco and suburban services.

Appellant has seen fit to raise much ado about allocation as between San Francisco and suburban services. It states that no consideration could be given to apportionment of traffic, revenue, and expense because "There is no evidence in the record \* \* \* not even an expressed expectation \* \* \*" on these matters. Again let us look at the record!

To characterize the suburban property—known as the San Mateo line—as an almost infinitesimal portion of the total becomes somewhat of an understatement when the total operations are viewed. (See R. 166-A.) The fact is that appellant "operates one car line south into San Mateo County (Line No. 40)." (R. 178.) And on this line appellant operates about 4 per cent of its equipment on which less than 5 per cent of its revenue passengers and total passengers are carried, and who account for less than 5 per cent of its total electric revenue (Table 2-I, R. 179). No adjustment in these suburban fares was ordered by the Commission. Nor did appellant at any time represent to the Commission that it needed an increase in such fares. Complaint at this late date seems hardly appropriate.

(d) The charge that "expectancy" rather than "facts of record" formed the foundation of the Commission's order is lacking in fact and is contradicted by the record.

The appellant charges that future revenue, future expense and future calculations were "unsupported expectations," "made without evidence." (Appellant's Brief, p. 45.) Without desiring to be unduly repetitious, the Court's attention is respectfully called to the detailed financial data contained in Exhibit 10, setting forth gross maintenance expense, gross operating expense, total operating expense, operating taxes, depreciation, operating income and total operating revenues, by years, from 1922 to and including 1942. In addition, the same data are of record for the 12 months ending April, 1943. (R. 83.) Also, the company's monthly reports from 1938 to April 1943 are a part of the record. (R. 378, 639-640.)

The processes utilized in developing each of the factors charged with being mere "expectations" have been minutely described, and the use to which Exhibit 10 and other reports were put has been detailed also. (See pages 10 to 15, inclusive, of this brief.) From these detailed records, outlining operating and financial results for many years, the Commission trended for the future. All doubts were obviously resolved in favor of the appellant as is evidenced by the liberality accorded it in operating expense allowance. If undue liberality toward the complaining party invades a constitutional guarantee or in any way impinges on the future successes of appellant, we stand before this Court as an admitted law violator, ready to have judgment pronounced.

- (e) The Commission did not go beyond the use of expert judgment predicated upon facts of record in ordering a 6-cent fare.

According to appellant, the Commission substituted "expert knowledge" for "expert judgment", then and thereafter arriving at its conclusions. Parenthetically speaking, so utterly ridiculous and wrong was the Commission that its order received the unanimous approval of the court below. And despite the fact that the lower court used language distasteful to appellant in sustaining the Commission's order (R. 620 and Appellant's Brief, p. 46), its (the appellant's) categorical statement that the position of the Commission and the California court "is contrary to the most fundamental concepts of procedural due process of law" does not, *ipso facto*, overturn the appealed from order and judgment. The Commission *did* "act upon evidence and not arbitrarily." This followed "due notice and an opportunity to be heard. \* \* \*." The procedure *was* consistent with the essentials of a fair trial. (*Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 392, 393.) The presumption resting in favor of the order, we submit, requires something more than mere assertion to overturn it.

If *Ohio Bell Tel. Co. v. Commission*, 301 U.S. 292, is cited on the theory that the rule of law therein contained is applicable to the instant proceeding, we vigorously differ with the appellant. There, "Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of informa-

tion secretly collected and never yet disclosed." (p. 300.) These star chamber tactics were used as the basis for an ordered refund. Under such circumstances obviously no fair hearing was accorded. And the order amounted to condemnation without trial as pointed out by this Court. (p. 300.) Under such circumstances "judicial notice" could not be successfully seized upon as the vehicle to cure the defect.

But where, as here, the Commission confined itself to ordering a 6-cent fare established upon concrete and indisputable evidence, it most certainly confined itself to calculations tempered with reasonable, fair and expert judgment well within the rule of the *Hope* case, *supra*, and not, as argued for, in conflict with the *Ohio Bell Telephone* case just discussed.

In no sense, as alleged, did the Commission at any time cite *Clark's Ferry Co. v. Commission*, 291 U.S. 227, for the proposition that, "without evidence, it could 'forecast into the future what the traffic was going to be.'" (Appellant's Brief, p. 49.) Experience has dictated that economic conditions are constantly changing, with the result that every rate order is in a practical sense experimental. Here, the Commission's expert judgment must be invoked in light of the record before it. It seems fairly obvious that regulatory agencies might frequently err in judgment due to changing economic conditions. Until the 6-cent fare had been tried and the subsequent facts disproved the Commission's judgment, appellant is hardly in a position to criticize or, so to speak, put words in the Commission's mouth. The opinion of the Commission contains a discussion appropriate at this point:

"The Commission, according to counsel, can make arithmetical computations, but it cannot reach a deduction or conclusion that earnings or traffic or expenses for the entire year will be proportionate or disproportionate to the experience of a substantial portion of such year, or will be greater or smaller than in the preceding year, even though there be evidence of definite trends and extended actual experience. We cannot accept the company's limitations thus set upon the functions and duties of the Commission in a proceeding of this nature. In our consideration of testimony we are not confined to the operation of an adding or computing machine, nor does the law or common sense prevent our exercise of reasonable judgment on the basis of an entire and voluminous record." (R. 127.)

"The Commission has based its conclusions on the operating and financial results of the fare increases and not on mere theory. The record shows the company's actual experience and we can see no reason why we should substitute mere theory when we have before us the uncontradicted facts." (R. 130.)

In brief, the Commission refrained from doing in this case that which appellant specifically charges it with having done; viz., ordering the 6-cent fare established on the basis of off record speculation; it went no further than to make permissible and lawful use of expert judgment derived from uncontradicted facts.

## III.

**THE ORDER IS NOT BASED ON MATTERS OUTSIDE  
THE RECORD.**

Appellant, in unequivocal terms, charges that the Commission based its order on evidence outside the record involving operations after May, 1943. (Appellant's Brief, p. 52.) It attempts to glean support for its position by quoting excerpts from our brief in the court below. We think it only fair that this Court be presented with the entire statement in our brief, being fully convinced that it refutes *in toto* the accusation of the appellant.

Preliminarily, however, we admit that perhaps a "technical irregularity" resulted in that, for illustrative purposes, January to August, 1943, revenues and expenses were compared with like data for the previous year. We do not see how appellant can seriously urge that such a comment, representing no more than an isolated comparison, thereby constitutes reversible error. If this be the case, opinion writers henceforth will have to shoulder an almost impossible burden. The isolated description, adjective, illustration, or comma may prove their undoing.

Even conceding the existence of an irregularity, this Court has little or no concern therewith. Its concern is whether the action of the Commission in the totality of its consequences avoids confiscation of appellant's properties. If this be achieved with appropriate regard for the safeguards of due process of law—and such achievement, we submit, has been obtained in the instant case—"there is no denial of due process, though the proceeding is shot through with irregularity or error." (*Railroad Commission v. Pacific Gas and Electric Company*, 302 U.S. 388,



The complete statement in our brief of record in the lower court (pp. 20-21) is as follows:

"\* \* \* In the decision of the Commission (Appendix to Petition, p. 33)" [R. 14, 82] "reference was made to a figure of \$8,321,000 as representing operating revenues for the 12-month period ended May 31, 1943. This figure appears at page 11 of Exhibit 10." [R. 182] "It is true that said decision (Appendix to Petition, p. 39)" [R. 14, 87] "referred to a figure of \$5,689,775 as representing the operating revenues of the petitioner for the period from January to August, inclusive, of 1943, and compared that figure with the figure of \$4,737,856 representing operating revenues of the petitioner for the same period in 1942. Respondent frankly admits that the figure of \$5,689,775 was taken from petitioner's monthly reports filed with respondent pursuant to the Commission's General Order No. 65. However, the respondent does not admit that this figure was used for any purpose other than by way of illustration because, as has been shown above, the 6-cent fare was permissibly based upon the operating figures of the petitioner that were included in the record. While respondent does not concede that the reference to these monthly reports of the petitioner to and including August of 1943 constituted error, nevertheless, should it be held otherwise, it is very obvious that such irregularity or error was harmless and immaterial and that such a situation comes squarely within the rule laid down by the United States Supreme Court in the case of *Railroad Commission v. Pacific Gas and Electric Company*, 302 U.S. 388, 394, 395. If, as has been conclusively shown above, the record supports the reasonableness of the 6-cent fare, it is perfectly immaterial whether or not the Commission may have used some additional figures or may have proceeded upon some erroneous theory so long as the result was correct. This is squarely



We heartily agree with appellant that essential requisites of a valid rate order are procedural and substantive due process of law. In that appropriate regard has been obviously had for these constitutional safeguards and in that we have demonstrated that the Commission's calculations, deliberations and conclusions were from facts of record, no good purpose would be served by debating further the cases discussed and cited by appellant at pages 53 to 55, inclusive, of its brief. Suffice it to say that appellees well understand the holding of the *Pacific Gas & Electric Company* case; that no quarrel is had with the principles for which *Interstate Commerce Commission v. Louisville & Nashville*, 227 U.S. 88, and *Carter v. Kubler*, 320 U.S. 243, and *West Ohio Gas v. Commission*, 294 U.S. 63, are cited. We most vigorously deny that the Commission has ever claimed a power to consider matters forming no part of the record (Appellant's Brief, p. 55), and to determine a rate order thereon. And we further challenge as erroneous the interpretation placed by appellant upon the opinion and conclusion reached by the California Supreme Court.

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#### IV.

##### **VALUE OF THE SERVICE WAS PROPERLY CONSIDERED BY THE COMMISSION.**

To appellant's claim that there is no evidence justifying a rate reduction on the basis of the value of its service (Appellant's Brief, p. 57), we take exception. In this respect the Commission did not limit itself to an examination of such matters as rate base and rate of return.

Instead it recognized its duty to the rate payers and, hence, inquired into the value or worth of appellant's service, even though this may have proved embarrassing to appellant.

In substance, it is appellees' position that in disposing of the rate aspects of a given proceeding, service may not be ignored. Instead, rate and service factors are inseparable elements.

Appellant seems to grasp some significance from the fact that only one witness testified at length on the value of service principles. Be that as it may, the witness referred to was the Commission's Assistant Director of Transportation and Chief Engineer, in charge of all the technical aspects of the case. Moreover, we gather from appellant's brief, p. 57, an implication that only a comment or two was made by the witness which was later seized upon by the Commission to sustain its rate order. Such, we submit, is unfair and far from being true.

Among the points made by this chief engineering witness were that

1. We cannot entirely close our eyes to the value of the service.
2. There is no question but that the passengers are getting less for their money today than they were when they got better transportation.
3. The public is willing to pay if you will give them some service.
4. The public is getting less for their money—"much less than in normal times, and I think we have to think of that."

5. The service is worse now than it was during the 5-cent era prior to the war emergency.

6. The cost of the service that the public is to pay, must pay, should have some relation to the quality of service that is rendered.

7. The value of the service should be in keeping with the rates.

These critical points were made in open hearing and subject to all the rigors of cross-examination by appellant. (R. 75-76.) Yet at this stage of the proceeding a plea of "no evidence" is made. Phrasing comment in the most kindly way possible, appellant's contention is utterly ridiculous.

Regardless of service to war industries and to the patrons of the San Mateo segment, a small and almost independent line previously discussed in this brief, *there was substantial evidence, as we have shown, on the relationship between rates and service and the interdependence of these two important factors.* The fact that rate-making elements are not equated by the witness in monetary terms is obviously immaterial. In no proceeding to our knowledge involving the lawfulness and propriety of a rate adjustment has any witness ever attempted to break down the two or more elements that may have been involved for the purpose of charging them with a dollars and cents value. The proceeding here under review represents no departure from the past.

Appellant has sought to detour the Court away from the basic and fundamental problem through a rebuttal of cases utilized by appellees and the court below, such

discussion being cited for the proposition that "A confiscatory rate cannot be sustained on the theory that it is an adequate price for the service independently valued." (Appellant's Brief, p. 59.) The quoted statement is obviously made to mislead this Court into the belief that the value of service principle controlled the Commission's order.

Firstly, *we wish to categorically deny such a charge.* We submit that the record and the details of the Commission's methodology of approach to the 6-cent fare, hereinbefore discussed, refute in every sense of the word such an open untruth. Secondly, we desire to be the first to agree with appellant on the abstract principle of public utility rate-making that "A confiscatory rate cannot be sustained on the theory that it is an adequate price for the service independently valued."

In that the principle as used by appellant has no application to this proceeding, no purpose would be served by discussing the cases referred to by appellant. It should be said, however, that appellant has shown poor taste in charging the lower court with misuse of authorities. We submit that the lower court was entirely correct when it said:

"• • • The findings of inadequacy in the maintenance and service are supported by the evidence. The commission is empowered under the statute in fixing the fare to take into consideration the quality of the facilities and service. The commission decided that even in war time improvement was possible, and that the value of the improved service would be no more than six cents. The problem of the value of the service, and the correctness of the commission's

decision on the consumer interest, do not involve constitutional questions, so long as otherwise the investor or company interest has received adequate consideration by the commission. When the company interest has received constitutional protection, the findings of the commission on the consumer interest become final in the proceeding. The question involving that interest then has been answered by the commission correctly pursuant to the statute and the authorities to the effect that the reasonableness of rates should not be considered apart from the adequacy of the service, and that the public should not be charged more than the service is reasonably worth. The statute is a legislative recognition of the public's right to demand that consideration be given to the value of the service. (Covington etc. Turnpike Co. v. Sanford, 164 U.S. 578, 596; Spring Valley Water Works v. San Francisco, 192 Fed. 137; see Article, Value of the Service as a Factor in Rate-Making, 32 Har. Law Rev. 516.)" (R. 622.)

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## V.

### THE ORDER IS NEITHER INVALID NOR CONFISCATORY.

With due deference to the *opinion* of appellant that its rate base may have reached extravagant proportions (Appellant's Brief, p. 65), *the fact of record* is that the fair value of its property for rate-making purposes is \$7,950,000. And, contrary to appellant's position, *market or commercial value can be a test!*

We are not for the first time urging a new and novel principle; it was considered and disposed of by the court below. (See pages 5 to 10 of this brief. If there is

anything improper in the use of the aforementioned sum, it rests in the fact that the properties were finally disposed of to the City and County of San Francisco for \$450,000 less than the Commission allowed to appellant as a rate base. Such a circumstance would hardly be error of which this appellant could complain.

Adverting now to the rather elaborate calculations developed in appellant's brief, pages 66 and 67, we see in the comments of Mr. Chief Justices Hughes in the *Lindheimer* case, *supra*, a most appropriate and succinct response: (p. 175)

"The case has long been pending and should be brought to an end. The Company has had abundant opportunity to establish its contentions. In seeking to do so, the Company has submitted elaborate estimates and computations, but these have overshoot the mark. Proving too much, they fail of the intended effect. It is not the function of the court to attempt to construct out of this voluminous record independent calculations to invalidate the challenged rates. It is enough that the rates have been established by competent authority and that their invalidity has not been satisfactorily proved."

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## VI.

### DEPRECIATION.

We would be remiss in our policy of "full disclosure" if we failed to call this Court's attention to a circumstance which illustrates the hopelessly confused position of appellant with regard to any satisfactory depreciation reserve. Reference is made to Exhibit 10 (R. 165) and

particularly Chapter VII thereof (R. 248-252), inclusive. There it will be noted that over the period from April 1, 1921 to December 31, 1942, appellant accrued depreciation *for tax purposes* in the total amount of \$26,834,000 as compared with appropriations to the depreciation reserve of only \$9,902,000, a difference of \$16,932,000. (R. 251.) As is stated in Chapter VII of Exhibit 10, the depreciation reserve set up by appellant bears little, if any, relationship to the accrued depreciation that now exists in its operative properties.

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We respectfully submit that the unanimous judgment of the Supreme Court of the State of California, affirming the order of the Railroad Commission, should be affirmed, or the appeal herein dismissed.

Dated, San Francisco, California,

February 14, 1945.

Respectfully submitted,

EVERETT C. McKEAGE,

RODERICK B. CASSIDY,

WYMAN C. KNAPP,

FRANK B. AUSTIN,

JOHN M. GREGORY,

*Counsel for Appellees.*

(Appendix Follows.)







**Appendix**

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**CASE No. 4680**

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**INVESTIGATION ON THE COMMISSION'S OWN MOTION  
INTO THE RESULTS OF OPERATION OF  
MARKET STREET RAILWAY COMPANY**

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**SUMMARY OF TRANSCRIPT AND EXHIBITS BEFORE THE  
RAILROAD COMMISSION**



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## GENERAL

Witness	Record Page	
Donovan	375 and Ex. 2 (R. 151)	Comparative balance sheet, profit and loss analysis, and income statement of Market Street Railway for the years 1938-1942.
Mors	Ex. 10 (R. 165)	As of December 31, 1942, Standard Gas and Electric Company's stock holdings represented 39.7 per cent of the total voting power; the next highest holdings represented 2.1 per cent (Table 1-1, R. 170).
Kahn	565	The local management and local directorate have full control over Market Street's operations. Standard Gas and Electric exercises no active voice.
Hunter	456	Observations and recommendations are based on wartime conditions. Under normal conditions the approach to the problem would be quite different.
Hunter	371	While the Commission has no jurisdiction over S. F. Municipal Railway, any study of operations of Market Street Railway must, of necessity, involve a study of the Municipal system and, to a smaller extent, the California Cable.

## REVENUE

### Trend of Revenue

Mors	Ex. 10 (R. 165)	Market Street's total operating revenue declined almost continuously from a maximum of \$9,903,000 in 1925 to a minimum of approximately \$6,060,000 in 1940 and 1941. It increased to \$7,575,000 in 1942 and \$8,321,000 for the 12 months ended May 31, 1943. Passenger revenue makes up more than 99 per cent of the total (page 11, R. 182, and Table 3-1, R. 184).
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<u>Witness</u>	<u>Record Page</u>	
Mors	Ex. 10 (R. 165)	Charts 8-1, R. 254-A, and 8-2, R. 256-A, show the trend and disposition of operating revenue of Market Street Railway.

#### **Effect of Fare Increases**

Hunter	373 and Ex. 1 (R. 142)	Fare passengers and passenger revenues of Market Street and Municipal Railways, 1933-1943 (graphs, R. 148-50). During the period 1933-1936 (5-cent fares), Market Street carried 71 per cent and Municipal 29 per cent of the combined traffic, and the revenue followed approximately the same division; during the three years 1939-1941 (Market Street fare 7 cents, Municipal fare 5 cents), Market street carried approximately 52 per cent of the combined fare passengers, and received about 60 per cent of the passenger revenue.
Mors	440	The introduction of the 2-cent transfer charge (in 1937) did not have a pronounced effect upon operating revenue, but the change to a 7-cent fare with 4 tokens for 25 cents in May, 1938, resulted in an immediate decrease in revenue (Chart 8-2 of Ex. 10, R. 256-A).
Mors	410	When tokens represented a saving (4 for 25 cents as compared with 7 cents cash fare) about 70 per cent of passengers used tokens; now, with no saving, only about 20 per cent of fares are tokens.
Kahn	556	Municipal Railway did not absorb all passengers Market Street lost after fare was increased; transfer occurred only on competitive lines.

#### **Universal Transfer**

Cahill	426	Adoption of universal transfer would cost Market Street and Municipal together about \$225,000 per year in revenue.
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<u>Witness</u>	<u>Record Page</u>	
Cahill	431	Cahill's opinion is that under present conditions a universal transfer would not bring much additional traffic.
<b>Miscellaneous</b>		
Mors	Ex. 10, (R. 165)	In 1942 Market Street's average fare per revenue passenger was 6.75 cents and the ratio of transfer passengers to revenue passengers was 39.8 per cent (Table 3-2, R. 190).
Hunter	483	Possibility of loss of revenue in one-man car operation under crowded conditions through inability of operator to prevent people entering rear doors was admitted.
Kahn	520	The Municipal Railway's revenue per car hour exceeded that of Market Street in each of the years 1934 to 1937 when the fare was 5 cents on both systems. Mr. Kahn attributes this to the fact that Municipal serves the more lucrative territory.
Kahn	523	Market Street has lost patronage due to extension of the Municipal Railway, as well as due to its own fare increases (See Exhibit 21, R. 306).
Kahn	535	After the restrictions on gasoline and rubber are removed Market Street expects its patronage to decline to pre-war levels.

## OPERATING EXPENSES

### Trends of Operating Expenses

Mors	412	"The charts (charts 4-1 and 4-2 of Ex. 10, R. 200-A, 202-A) show that whereas total operating expenses declined about 35 per cent from 1927 to 1941, maintenance expenses declined more than 50 per cent."
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<u>Witness</u>	<u>Record Page</u>	
Mors	Ex. 10 (R. 165)	Way and structures maintenance expense per car-mile has been relatively constant; however, the expense per mile of track has dropped to less than half of the 1924-1928 level (Table 4-2, R. 204-A).
Mors	435	Market Street's equipment maintenance expense per car-mile has been fairly constant and comparable to Municipal's but considerably lower than Los Angeles Railway's. Market Street has spent relatively more for maintaining the electrical equipment of cars and less for maintaining the cars themselves.
Mors	Ex. 10, 220	Market Street's "conducting transportation" expense per 100 passengers increased from \$1.38 in 1934 to a maximum of \$2.27 in 1940; in 1942 it was \$1.99 and amounted to 55.6 per cent of total operating expense. Wages of platform men comprised 84 per cent of the "conducting transportation" expense in 1942 (Table 4-18, R. 228).
Mors	Ex. 10, 232	General and miscellaneous expenses declined from a peak of \$1,072,000 in 1929 to a low of \$656,000 in 1941. Most of the subsequent increase in 1942 was in injuries and damages accruals.

#### **Wages**

Kahn	Ex. 20 (R. 294) and 555, 563	This exhibit sets forth the demands made upon Market Street Railway by the union. Company estimates that the union's demands would cost \$1,250,000 per year in additional operating expense. It has not agreed to the demands, and the question of a wage adjustment is presently before the Regional War Labor Board.
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Record  
Page

Witness

Kahn      Ex. 20      Principal wage demands on Market Street Rail-  
(R. 294)      way, now before the Regional War Labor Board:

- | 1. | <u>Hourly Wage Rates</u>   | <u>Present Top Rate</u> | <u>Union Demand</u> |
|----|--|-------------------------|---------------------|
|    | Street car operators   |                         |                     |
|    | (2-man)  | 83¢                     | \$1.00              |
|    | Bus and car operators  |                         |                     |
|    | (1-man)  | 90¢                     | \$1.10              |
|    | Increases demanded also in other classes of labor  |                         |                     |
| 2. | Guaranteed 48-hour week with time-and-a-half for all over 40 hours. The demands also involve working conditions. |                         |                     |

**TAXES.**

- Mors      Ex. 10,      Market Street's operating taxes as charged ranged  
236      between \$402,000 and \$432,000 over the last six years. Ad valorem taxes made up 47 per cent of the total in 1942, and unemployment insurance and social security taxes 34 per cent (Table 5-1, R. 238).
- Mors      435      Market Street has not paid any federal income tax for a number of years.
- Kahn      521-22      Market Street is setting up income tax accruals in 1943 and these are not reflected in the comparative income statement figures for 1943 in Exhibit 1, R. 142.
- Kahn      561      If Market Street leased its properties to the city for consolidated operation, the rentals would be classed as income and taxed accordingly. This would limit the return to such an extent as to make the plan impracticable.
- Hunter      372      The Municipal Railway system pays no taxes.

## DEPRECIATION

### Depreciation Expense

<u>Witness</u>	<u>Record Page</u>	
Mors	438	For a number of years an annual appropriation of \$500,000 for depreciation has been credited to the depreciation reserve and charged to profit and loss.
Mors	438	An approximate calculation based upon historical cost shows the annual straight line depreciation expense requirement to be roughly \$780,000.
Mors	438	In May, 1943, the company increased its monthly depreciation charge to provide an annual accrual of \$750,000 instead of \$500,000.
Mors	438	If adequate provision is not made or cannot be made for currently accruing depreciation, the inevitable result is that some of the capital investment is consumed.

### Depreciation Reserve

Mors	438	The depreciation reserve balance of \$1,023,887 at the end of 1942 amounts to less than 3 per cent of road and equipment per books.
Mors	439	No charges were made against the depreciation reserve prior to 1927.
Mors	439	Net charges to the depreciation reserve averaged \$780,000 in the eight years 1935-1942 as against annual appropriation of \$500,000 (See Table 7-1 of Ex. 10, R. 250).
Mors	439	Only about 29 per cent of the retirement of three car lines abandoned during 1942 was charged to the depreciation reserve, the remainder (approximately \$883,000) being charged to profit and loss.

## Disposition of Depreciation Accruals

<u>Witness</u>	<u>Record Page</u>	
Mors	Ex. 10 (R. 165)	Total additions and betterments from April 1, 1921, to December 31, 1942, including construction of two new car lines, aggregated \$6,109,000 (while moneys withheld as depreciation accruals aggregated \$9,902,000 in the same period (Tables 6-1 and 7-1, R. 242, 250).

## EARNINGS

### Trends of Earnings

Hunter	371 and Ex. 1 (R. 142)	Comparative income statements of Market Street Railway and S. F. Municipal Railway, 1932-1942 and first three months of 1943. Lowest passenger revenue of Market Street was in 1940—\$6,015,000; 1942 passenger revenue was approximately \$7,535,000. Operating income ranged from a deficit of \$40,234 in 1940 to \$1,069,914 in 1942.
Donovan	Ex. 2 (R. 151)	Comparative income and profit and loss statements of Market Street Railway—1938 to 1942.
Hunter	370 and Ex. 1 (R. 142)	Comparative income statements of Municipal Railway, 1932-1942, and first 3 months of 1943.
Hunter	372 and Ex. 1 (R. 142)	Combined income statements—Market Street and Municipal Railways “* * * we have merely taken figures appearing in the preceding pages and consolidated them into a combined statement.”
Hunter	464	For the 21-year period 1922-1942 Market Street's net operating income averaged \$878,000 per year.
Mors	Ex. 10 (R. 165)	Chart 8-2, R. 256-A, shows monthly trend of revenues, expenses, and net operating income from January, 1937, to April, 1943, with fare changes and other significant happenings noted.

<u>Witness</u>	<u>Record Page</u>	
Kahn	557	For more than 10 years prior to 1942 Market Street was in desperate financial condition. It became delinquent in its electric power bills to extent of over \$600,000, which debt was not fully liquidated until March or April, 1943.
Mors	440	Operating income for the 12 months ended April 30, 1943, was approximately \$1,250,000.
Hall	481-82	After providing for depreciation at \$500,000 per year the comparative income statement (sixth page of Ex. 2, R. 156) would show an accumulated deficit of \$326,917.66 for the years 1938 to 1942, inclusive.

#### **Effect of Fare Changes**

Hunter	377	Commissioner Sachse brought out from Exhibit 1, R. 142, that despite fare increases Market Street's operating income was lower in each of the years 1938 to 1941 than the lowest operating income prior to the fare increases.
Kahn	520	The combination of 2-cent transfer with 5-cent fare, established by the Commission in 1937, put Market Street in worse financial condition than it had been theretofore.
Kahn	538	Kahn contends company would have fared much better in net income in the first six months of 1938 under a 7-cent fare than it did with the 5-cent fare and 2-cent transfer.
Kahn	526	The 7-cent fare enabled Market Street to meet its pressing financial obligations and thereby precluded the possibility of bankruptcy. If the company had continued on a straight 5-cent fare, it would be bankrupt today.



<u>Witness</u>	<u>Record</u> <u>Page</u>
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Kahn 528 and  
Ex. 22  
(R. 311)

Based upon the assumption that patronage would follow the S. F. Chamber of Commerce business, that revenue per car hour would remain constant at the 1937 level, and that operating expense per car hour would have been the same as was experienced at the higher fares, the exhibit attempts to support the conclusion that the company was much better off in 1939 with the 7-cent fare than it would have been with a 5-cent fare; and that it was worse off in the first half of 1938 with the 2-cent transfer than it would have been had it retained the straight 5-cent fare.

Rossi 416

It would be possible, under municipal ownership, to operate the unified Market Street-Municipal system at a profit on a 6-cent fare.

**Plan to Place Excess Earnings in Special Fund  
for Future Modernization**

Hunter 468-69

Situation is that though Market Street's service is poor, its earning position is relatively favorable and probably will continue so for the duration and a reasonable period thereafter. Under these conditions it seems fair and desirable that some program should be made now whereby a fund will be created to insure good service when men and materials are again available.

Hunter Ex. 17,  
286

"Market Street Railway should place in a special fund its gross revenues less the amounts necessary to defray: Operating expenses—exclusive of depreciation, taxes, interest, sinking fund payments, and equipment notes. Withdrawals from the special fund should be subject to the approval of the Commission."

<u>Witness</u>	<u>Record</u> <u>Page</u>
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Hunter 486-87 and Ex. 19, 291	(Statement and Exhibit offered by counsel.) Market Street's Supplemental Bond Indenture of April 1, 1940, provides, in part, that:
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"9. No payment shall be made on indebtedness to Standard Gas and Electric Company (principal or interest) until the bonds are paid in full.

"10. No payments on principal of existing bank loans shall be made, except after meeting bond sinking fund requirements.

"11. Any cash remaining after meeting sinking fund requirements shall be used for capital expenditures and working capital, any amount over such requirements to 'be used as an additional sinking fund for the Bonds and bank loans pro rata to the principal amount of each.' "

### Future Outlook

Hunter 469	San Francisco is one of the best cities in the United States with respect to the street transportation business. There is a high riding habit and a short average ride, which go to make a profitable operation.
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Hunter 469	" * * * I feel that the Market Street Railway can look ahead to future operations with prosperity if it surrounds itself with modern equipment, * * * "
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Kahn 558	Present level of income of Market Street and Municipal Railways is temporary; much patronage will be lost as soon as restrictions on gasoline and rubber are lifted.
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**Miscellaneous**

<u>Witness</u>	<u>Record Page</u>	
Hunter	470	Operating expenses and taxes have first priority in the disposition of operating revenue. This is in the interest of the public and of the operating companies themselves.
Hunter	470	Interest is a part of return, and sinking fund payments and equipment note retirements serve to reduce the outstanding obligations.
Rossi	416	Operating under the 5-cent fare at a profit which now amounts to over a million dollars a year, the Municipal Railway has accumulated a good surplus.
Cahill	548	Under present traffic conditions the Municipal Railway would remain in the black at 6 tokens for a quarter.
Kahn	561	Lease of properties to city (See under Taxes).

**INVESTMENT IN ROAD AND EQUIPMENT**

Mors	436	Market Street's books showed \$41,769,000 as of December 31, 1942, compared with \$46,851,000 on April 1, 1921. A Railroad Commission historical cost appraisal, brought forward from 1920 by adding book net additions and betterments each year, yields an undepreciated historical cost of \$25,344,000 as of December 31, 1942.
Mors	437	The 1920 appraisal included only operative property.

<u>Witness</u>	<u>Record Page</u>	
Mors	436	The decreases in road and equipment since the 1926 peak have been due principally to the abandonment of certain lines and the retirement of much equipment without its being replaced.
Kahn	558	Motor coaches costing about 1¼ million dollars have been purchased on a deferred payment plan from 1939 to the present.
Rossi	413-14	Company's offer to sell operative properties for \$7,950,000 (See under "Purchase of Market Street Railway by City").

### PHYSICAL PROPERTIES

#### Tracks

Hall	379	Preliminary inspection of Market Street's tracks showed that there is much deferred maintenance on the system. While reasonably safe for moderate operating speeds it is imperative that the deferred maintenance be caught up as soon as men and materials are available.
Hall	380	Track maintenance program described.

#### Paving

Vensano and Ex. 7 (R. 639)	403	The city's paving report "indicates that the [Market Street Railway's] total obligations for bringing the paving into proper condition would cost \$1,691,162.76." This amount does not include any track reconstruction except the minimum cost of raising the rail to a uniform grade line where that is necessary.
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<u>Index</u>	<u>Record</u> <u>Page</u>	
ensano	406	This deferred paving maintenance has accumulated over many years.
all	392	"* * * broken pavement allows water to get in under the roadbed and would contribute to the soft roadbed in the wintertime."

### Equipment

all	382 and Exs. 3, 5 (R. 159, 160)	Inventory of rolling stock as of May 1, 1943. Some 73 electric cars and 12 cable cars were out of service at that time. Most of the electric cars would apparently be usable after a reasonable amount of maintenance.
all	384-85 Ex. 4 (R. 160)	Car repairs, Number of "turn-ins" and causes.
unter	498	Market Street at present has 56 two-man cars in storage which could be put in service after minor repairs, and 14 one-man cars which would need a little work to convert them for two-man operation.
all	498	All buses are in service except those going through the shops for repair and one old bus assigned to Civilian Defense work.
ahill	423-24	Municipal has sought O.D.T.'s approval for purchase of 50 additional motor coaches and trolley coaches but priorities have repeatedly been refused on the grounds that all rolling stock in San Francisco is not being utilized.
all	382	Preliminary investigation indicates considerable deferred maintenance on street cars now in active service.
ahn	396-97	(Preliminary statement as counsel.) "We have no definite program of setting aside anything for maintenance. We think our first obligation is to dis-

WitnessRecord  
Page

charge our debts; \* \* \* we feel that we will then be in shape to refinance when the war is over or perhaps sooner so that we can improve our service generally, \* \* \*

Newton

574

Five motor coaches were obtained since Pearl Harbor for conversion of Sacramento Street cable line, three additional coaches for Third Street line, and sixteen coaches leased from the Navy.

**Additional Equipment**

Kahn

559

Market Street is unable to purchase motor coaches at the present time.

Jenkins

513

Navy has procured 16 buses under Public Law 779 and lease them to Market Street Railway for the Bethlehem Shipyard and Hunter's Point service.

Newton

574

To date 48 street cars have been remodeled with longitudinal seats and no bulkheads to increase capacity.

Jenkins

515

There is an extreme scarcity of passenger-carrying, transit-type equipment. The Navy finds it extremely difficult to procure buses for its own official use.

Jenkins

513

O.D.T. has jurisdiction over bus allotments to the Navy as well as over the release of buses and street cars to transportation agencies. Navy must comply with O.D.T.'s general orders.

**Modernization**

Hunter

485

Market Street began modernization program with motor coaches (and trolley coaches on one line) several years before Pearl Harbor (See also pages 7 and Chart 2-1 of Exhibit 10, R. 173, 176-A).

Witness	Record Page	
Kahn	558	Market Street converted its Harrison Street line to trolley coach operation in 1935 as an experiment; in 1939 it began large scale conversion of street car lines to motor coach operation. Motor coaches were considered more practicable than trolley coaches for two reasons: (1) somewhat lesser cost, and (2) greater flexibility.
Hunter	486	<p>Quotation from C.R.C. Decision No. 35753 in California Cable Application 24456:</p> <p>"The exercise of foresight by that company [Market Street Railway], in meeting changing conditions and decreased revenues by substituting transportation facilities that are less costly to operate, might also have been followed by applicant herein if it had been interested in effecting the greatest degree of profit commensurate with reasonable service and low fares."</p>
Kahn		Market Street will continue its modernization program after the emergency period in so far as its means permit, but has no cut and dried program since it wants to be able to take advantage of the most advanced equipment. May not be feasible to substitute buses on trunk street car lines.

### FARES

#### Relation of Fares to Service

Hunter	Ex. 17, 279	Service is an important item to consider in justifying a rate structure.
Hunter	467-68	Customers are getting much less for their money today than in normal times. The public is willing to pay if it can get service.



<u>Witness</u>	<u>Record Page</u>	
Hunter	468	The public should not have to pay the same price for poor service as they formerly paid for good service, regardless of the reason for the poor service.
Hunter	492	There are many elements other than service which must be considered in fixing a proper rate.

#### **Comparison with Other Localities**

Hunter		The average street car fare throughout the United States is in excess of 8 cents.
Hunter		San Francisco's average length of haul is among the lowest in the country, which would make for a higher fare per mile of travel.

#### **Fare Changes**

Mors	Ex. 10, 177	Rate history of Market Street Railway Company.
Kahn	520	Market Street Railway did not ask for the 2-cent transfer charge established by the Commission in 1937. It considered and discarded such a fare. Its application was for a fare of 7 cents with 4 tokens for 25 cents.
Kahn	538	Kahn contends company would have been better off as to net income in the first six months of 1938 under either the 5-cent fare or the 7-cent fare than under the 5-cent fare with 2-cent transfer.

#### **Miscellaneous**

Hunter	465	An increase in wages would be reflected in the rates since labor amounts to more than half the operating expenses.
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<u>Witness</u>	<u>Record Page</u>	
Cahill	420	On May 3, 1943, Mr. Cahill wrote Mr. Crowe of O.D.T. stating that the S. F. Public Utilities Commission strongly advocates a uniform 5-cent fare and universal transfer.
Cahill	430	There should be no charge for transfers. They would not be worth as much as one cent.

#### **PURCHASE OF MARKET STREET RAILWAY BY CITY**

Rossi	413	The original proposition for city to purchase Market Street Railway was on a lease-purchase plan recommended by the Public Utilities Commission. After hearings the Board of Supervisors decided a revenue bond issue would be more desirable.
Rossi	413-14	"* * * in my opinion, the transportation problem in San Francisco will never be solved until we have a unified system, one fare and one ownership, * * *." Mayor Rossi testified that under municipal operation, with a 7-cent fare, the unified system operations would have yielded a profit of \$4,879,000, compared with an estimated profit of \$2,416,000 (for the 12 months ended June 30, 1943; Cahill testimony, R. 419).
Rossi	415	"I am still of the opinion that the only way to do it would be to devise some plan, self-liquidating plan, where the City would eventually own the property of the Market Street Railway Company."
Cahill and Ex. 8 (R. 163)	432	On September 24, 1942, Market Street Railway offered to sell its operative properties to the city for \$7,950,000 cash.
Cahill and Ex. 9 (R. 164)	433	The offer to sell for \$7,950,000 was repeated March 25, 1943.

<u>Witness</u>	<u>Record</u> <u>Page</u>
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Hunter	Ex. 17, 283	“The service to the city as a whole would be improved if the facilities of the Market Street Railway and Municipal lines were consolidated or at least an operating agreement existed whereby the available facilities of both systems could be used to the best advantage of the city service particularly at this time when there is such an urgent need for transportation service and little available new facilities.”
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Hunter	471	“I personally would be favorable to recommending to the Commission that steps be taken to acquire the property of the Market Street Railway, operating property, by the City.”
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## MANPOWER

### General

Kahn	396	(Preliminary statement as counsel.) “Generally speaking our difficulty at this time is not one of equipment, it is one of manpower * * *.”
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Kahn	398	“We have cars that are in good operating condition now that we cannot operate because of the manpower shortage.”
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Hall	Ex. 11, Table II, 264	In April, 1943, the platform manpower shortage on Market Street was 18 per cent; on Municipal 9 per cent; and on Los Angeles Railway 13 per cent. By June Market Street's shortage had increased to 22 per cent while Municipal's had dropped to 6 per cent.
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Hall	388-89	In March, 1943, overtime paid to platform men averaged 415 hours per day. Men on sick leave averaged 101 per day and men on vacation pay averaged 59. A large majority of platform men
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Witness	Record Page	
Hall	Ex. 11, Table III, 265	worked through their vacations (Table IV of Ex. 11 shows estimated platform requirements for March, 1943, as 1,582 persons, R. 266).
Hunter	500	Market Street sustained a net loss of 13 platform employees in the 14 months ended June, 1943, while Municipal gained 143.  The fact that the best earning position may be achieved with some degree of labor shortage may be a contributing factor in the present manpower situation on Market Street Railway.
Newton	568	Manpower situation has improved since June 1. Market Street will make full use of manpower whenever more is available.

#### Steps Taken to Relieve Manpower Shortage

Kahn	398	Steps taken by Market Street to obtain additional manpower include: (1) hiring of women, principally as conductorettes, but to some extent as car and bus operators and garage labor; (2) advertising for help; and (3) offering rewards to employees for securing new employees.
Newton 567 and Ex. 26 (R. 332)		Summary of company's efforts to relieve the manpower shortage: Newspaper and radio advertising, posters, bonuses to employees attracting new employees, outdoor signs and signs on outside of one car and one coach, hiring of part-time employees.
Hunter Newton	460 567	Market Street spent more than \$8,000 during the past year to attract additional employees; \$7,500 of this was for newspaper advertising (See also company's Ex. 26 (R. 332)).
Hunter	461	Suggests company try to attract and use office workers for part-time platform work.

**One-Man Car Operation (See also under Service)**

<u>Witness</u>	<u>Record Page</u>	
Hunter	461	If one-man car ordinance could be suspended for the duration, it would permit of putting more cars on the street. Care would have to be exercised in determining which lines are suitable for one-man operation. Ground loaders should be maintained at heavy traffic points (Ex. 17, page 10, R. 285).
Kahn	396	(Preliminary statement as counsel.) Suspension of the one-man car ordinance would relieve Market Street's shortage of platform labor to a great extent.
Holm	462	(Statement as counsel.) Advises Commission that to suspend the one-man car ordinance would require a vote of the people of San Francisco since it is an initiative ordinance. The ordinance was sustained by the U. S. Supreme Court.
Newton	568	Market Street is attempting to have question of one-man car operation for the duration submitted to voters at November election.
Hunter	465	Opinion that permitting one-man operation for the duration would not result in any layoffs.

**Wages and Working Conditions**

Kahn.	398	(Preliminary statement as counsel.) Wage scales of platform personnel of Market Street Railway.
Hunter	496	One of the main causes of the manpower shortage is the wage situation. Low wages make it difficult to attract new employees.
Hunter	465	Many Market Street employees have left to go to shipyards and other places where pay is high; many would return to the railway company if the

<u>Witness</u>	<u>Record Page</u>	
		pay were comparable. Any increase in wages would be reflected in the rates since labor amounts to more than half the operating expense.
Hunter	462	The general practice is to pay somewhat higher wages for one-man car operation than for two-man operation.
Kahn	503, 569	Market Street cannot work women more than 54 hours per week due to regulations of the State Division of Industrial Welfare, while the Municipal is not so restricted. Women employees generally want to work more than 54 hours per week to get more overtime pay.
Cahill	548	Municipal Railway is not restricted to a 54-hour week for women and many women platform employees work beyond that figure.
Newton	569	Market Street's working conditions are in some ways more favorable than the Municipal Railway's viz.: Union agreement, checkoff, four hours minimum pay for a tripper, pay for waiting time, low-cost medical protection.

#### **Manpower Shortage in Municipal Railway**

Cahill	542, 549 and 552	Reduction in Municipal Railway's shortage of platform personnel from 210 in November, 1942, to 80 as of September 15, 1943 (based on 48-hour week), attributed to (1) wage increase of July 1, 1943; (2) intensive newspaper and radio advertising campaign; (3) working conditions; and (4) "freezing" of employees by War Manpower Commission.
Cahill	429	Municipal's platform labor shortage was 110 (10 per cent) as of July 15, 1943, compared with 250 a short time earlier.

<u>Witness</u>	<u>Record Page</u>	
Hunter	500	Less severe manpower situation on Municipal Railway than on Market Street can be accounted for largely by somewhat higher wages, civil service, better working conditions, etc.
Cahill	429	Believes that Municipal could man 30 more street cars by working platform personnel overtime.
Hunter	484	Commission staff has made no investigation of Municipal Railway's ability to man Market Street's idle cars.

### SERVICE

#### Traffic and Loading

Hall	385-86 and Ex. 6 (R. 161)	Traffic checks—spot checks of load and headway characteristics during peak periods. Average peak-hour load factors April 29 and 30, 1943: Inbound, a.m., 1.6; outbound, p.m., 1.7 (Seated load = 1.0).
Hall	Ex. 11 (R. 262)	Frequency of service and loading of street cars (Charts 1 and 2, R. 272-73).
Kahn	504	The afternoon peak is the most critical period from the service standpoint.
Hunter	495	If Market Street's idle cars could be put in operation, it would materially improve the service on heavily loaded lines during peak periods.
Newton	588	Newton thinks peak-hour loads today are not materially different from those five years ago. Staggered hours program has lengthened the peak-load periods.
Kahn	536	Contends that in normal times an increase in traffic would be spread over the day following the established traffic pattern, and that the increase in car-hours would be approximately in the same proportion.



### Performance of Schedules

<u>Witness</u>	<u>Record Page</u>	
Hall	389	In March, 1943, there were an average of 16 cars out of service and 69 trips lost, per day. Loss of schedules is due primarily to company's inability to secure sufficient platform men or women to run all of their schedules and hold overtime to a minimum.
Hall	Ex. 11, Table I (R. 272)	Car and coach schedules of Market Street Railway not performed increased from 0.2 per cent in September, 1942, to 10.3 per cent in June, 1943, while for Municipal Railway during the same period the hold-ins never amounted to more than 0.1 per cent. Los Angeles Railway's unfilled schedules amounted to 4.5 per cent in May, 1943.
Hall	Ex. 11 (R. 262)	Comparison of actual performance with operating schedules (Charts 3-6, R. 274-78).
Hunter	464	Many of the Market Street cars operate ahead of schedule, which is contrary to good practice (See also Chart 3 of Ex. 11, R. 274). In many cases there are groups of cars coming together, followed by rather long intervals of no cars.
Newton	573	Market Street operated 95.09 per cent of scheduled runs in August, 1943 (See Exhibit 26, R. 332).

### Quality of Service

Hall	391	"Unquestionably more service could be used on some of the lines * * * particularly during the peak period * * * Utmost care should be taken * * * to avoid * * * bunching of equipment * * *"
Hunter	506	The present Market Street service would in normal times be considered unreasonably bad.
Hunter	456-57	Exhibits introduced in the record support the conclusion that the service on Market Street Railway should be improved, even under war-time conditions.

<u>Witness</u>	<u>Record Page</u>	
Hunter	484	Service is difficult to improve at this time because of heavy traffic and the manpower shortage.
Negrin	476	Mrs. Helen Negrin introduced testimony in her own behalf regarding the poor service of Market Street Railway.
Newton	571	Few service complaints by letter received by Market Street so far in 1943 (See Exhibits 27 and 28, R. 339).
Kahn	504	Market Street Railway does not attempt to adhere to a definite standard of service (such as the City of Los Angeles standard of 175 per cent of the seating capacity and a 25-minute stand) but attempts constantly to fit its facilities to best suit the needs of the people.

#### **Relation between Service and Fares**

Hunter	Ex. 17 (R. 286)	"The value of the service should be in keeping with the rates."
Hunter	493	Following the fare increases, Market Street's business dropped off and the service was then adjusted to the reduced traffic requirements. Headway is one component of the "value of service."

#### **Service to War Establishments**

Newton	582 and Ex. 31 (R. 363)	Summary of Market Street service to shipyards and war industries:
<ol style="list-style-type: none"> <li>1. Service to Ferry Building for Richmond Shipyard ferry connection.</li> <li>2. Motor coach service to Hunter's Point.</li> <li>3. Third Street car line extension to Mariposa Street to serve Bethlehem Steel.</li> <li>4. Augmentation of No. 22 Fillmore line service for benefit of Bethlehem Steel employees.</li> </ol>		

5. Motor coach contract service to Western Pipe and Steel at South San Francisco.
6. Special motor coach service for the Navy and Army.
7. Other augmentation of service to take care of needs of war industries.

Coordination of all schedules is necessary since a large proportion of war workers use more than one line in getting to or from work.

Newton 584 and  
Ex. 32  
(R. 364)

Letter of commendation from O.D.T. on Market Street's service to war plants. This letter mentioned O.D.T.'s survey of local transportation, recently completed, which shows an excess of service over demand by Market Street Railway in off-peak hours. Detail of O.D.T.'s recommendations has not yet been disclosed.

Hunter 485

Transportation to shipyards and other war industries should come first. No complaints have come to the Commission from shipyards or war industries regarding Market Street's service.

Jenkins 511

Navy transportation officers have worked closely with Market Street Railway in preparing service to Bethlehem Shipyard and Hunter's Point Drydock, both of which have large employment. Market Street's service to these establishments has been satisfactory. Market Street has been cooperative in reacting to the Navy's suggestions.

Jenkins 512

Service requirements of the Navy will increase greatly in the near future.

Jenkins 514

Possibly better utilization could be made of the Third Street rail line if it were extended closer to the gate at Bethlehem Shipyard.

<u>Witness</u>	<u>Record Page</u>	
Jenkins	516	The Navy is prohibited from establishing its own regular-schedule transportation system for either Navy personnel or civilian workers unless there is no other mode of transportation available. It establishes its own service only as a last resort.
Jenkins	518	The Navy's first step, if service requests are not complied with satisfactorily, is to request action by O.D.T. This has not yet been necessary in San Francisco.
Jenkins	513	The fluctuation in employment at Naval establishments is more closely tied in with service than with fares, and with time in transit rather than with the inconvenience of getting into the vehicle.

#### **Design of Schedules**

Hunter	460	The matter of making schedules is one of the most important things in street railway operation.
Hunter	457	Description of scheduling procedure in Market Street Railway.
Newton	586	General procedure of designing schedules in Market Street Railway. Under present conditions more trippers are used than in normal times in order to make use of part-time workers. It is necessary to build all schedules around service to war industries. In designing schedules Market Street attempts to give as good service today as in normal times but it is much more difficult.
Newton	587	In designing schedules today differences in running time at different times of day are taken into account. Basic data for schedule design are from traffic checks; conductors' checks are not altogether reliable.

**Supervision**

<u>Witness</u>	<u>Record Page</u>	
Hunter	459	The complicated character of Market Street's operations requires a relatively large number of field inspectors. Salaries of Market Street's inspectors are low in comparison with those of the Municipal Railway, Key System, and Los Angeles Railway.
Hall	454	Closer supervision on the Market Street lines should improve the service.
Hunter	459	Market Street's service could be bettered by an improvement in the field inspection.
Hunter	Ex. 17 (R. 285)	"Market Street Railway should provide better service through improved field supervision, so that when cars or buses get off schedule and operate in close proximity with resulting long intervals between units, some of them should be turned back even at the expense of discommoding some passengers in the interest of better over-all service on the system."
Newton	588	Number of inspectors has been increased since Hunter's recommendation in May; Newton believes this improved the results.
Newton	575, 581	Market Street has a chief inspector, 28 regular inspectors and 2 relief inspectors. The inspectors are selected from best qualified experienced platform men. Inspectors now receive \$180 per month. Company application to Wage Stabilization Board in May, 1943, to permit increase to \$200 was denied but new application is being made.
Newton	575	Market Street provides motorcycles for inspectors to increase their efficiency.

## Market Street Bottleneck

<u>Witness</u>	<u>Record Page</u>	
Hall	Ex. 11, Table IX (R. 271)	On Market Street just below Sansome 146 out bound cars used the outer tracks and 82 the inner tracks during the 4:30-5:30 p.m.: peak hour on May 24, 1943.
Hall	Ex. 18 (R. 286a)	Traffic flow on Market Street during afternoon peak (Chart).
Cahill	425	At Sansome and Market there are 1,900 cars per 24 hours on outer tracks and 1,100 on the inner tracks. Shift of "K" and "L" cars to inner tracks would equalize this.
Hall	Ex. 11, Table X (R. 271)	Traffic check on May 24 showed average speed of cars on the inner tracks on Market Street to be 5.6 per cent higher than outer track speeds during the morning peak and 17.7 per cent higher during the afternoon peak.
Cahill	420	Mr. Cahill on May 11, 1943, wrote O.D.T. that the S.F. Public Utilities Commission proposes: (1) to lease from Market Street Railway the right to operate its "K" and "L" lines on the inner tracks on Market Street from Fremont Street to Twin Peaks Tunnel. Market Street Railway had suggested that in return for the above privilege they be permitted to operate their "31" and "5" lines on the outer tracks. This, he stated, would nullify the benefits to be gained at the Sansome and Market "bottleneck" by transferring the "K" and "L" lines to the inner tracks; and (2) to lease as many street cars as Market Street Railway can spare.
Hunter	466	There should be an operating agreement between Market and Municipal to achieve better utilization of the track space on lower Market Street and to



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Page**

put as much equipment on the roads as can be manned. Giving Municipal an opportunity to use the inside tracks would speed up service to some extent (See also Ex. 17, R. 286).

- Jahn 524, 525 Suggests as solution to the lower Market Street bottleneck that the city permit Market Street Railway to operate its "N" route. This would release 31 Municipal cars for use on other parts of its system. The "N" line represents 20½ per cent of the car hours on Municipal lines using Market Street.
- Cahill 547 Substitution of service by Market Street for Municipal's "N" line would result in improved over-all service but Cahill does not consider it justifiable to increase the "N" patrons' fare, particularly since they paid for the Duboce Tunnel through assessments.

**One-Man Car Operation** (See also under Manpower)

- Hunter 490 Operating certain lines with one man (for the duration) would permit of putting more cars on the street.
- Hunter Ex. 17 (R. 285) "With the release of manpower [from suspension of the one-man car ordinance] additional cars and buses should be placed in service."
- Hunter Ex. 17 (R. 284) With one-man operation, consideration should be given to using ground loaders at heavier loading points.

**Miscellaneous**

- Newton Ex. 29 (R. 341) Changes in operating practices and revisions of routes in accordance with O.D.T. directives or suggestions.



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<u>Witness</u>	<u>Record Page</u>	
Newton	573	Market Street has eliminated about 10 per cent of stops since April, 1942, in line with O.D.T.'s skip-stop program. Skip-stops on Market Street not permitted by the Public Commission.
Hunter	465	Skip-stop program should be expanded in the interest of improving service. Elimination of stops along Market Street would require careful co-ordination of traffic signals, but it is desirable (See also Ex. 17, R. 286).
Newton	588	About 25 per cent of Market Street's service is by buses at present time.
Kahn	523, 524	Market Street abandoned its Howard Street car line at the request of the city, the franchise having expired and the city thereafter inaugurated trolley coach service on Howard Street.